Supreme Court, U.S.
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No. 991204

In The

Supreme Court of the United States

ERWIN RAUTENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the District Courts without jurisdiction to hear and decide a motion just because the motion was made in the wrong form?

LIST OF PARTIES

Erwin Rautenberg, Petitioner
United States of America, Respondent

Parent and Subsidiaries, None.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Erwin Rautenberg respectfully prays that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals holding that it lacked jurisdiction to hear the appeal herein.

ORDERS BELOW

The September 22, 1997 order of District Judge Audrey Collins denying Petitioner's motion to set aside the protective order of November 6, 1984 is attached hereto as Appendix 2. The August 27, 1999 Memorandum of the Ninth Circuit Court of Appeals is attached hereto as Appendix 1. The October 21, 1999 order of the Ninth Circuit Court of Appeals denying Petitioner's Petition for Rehearing and Rehearing in Banc is attached hereto as Appendix 3.

JURISDICTION

On September 22, 1997 District Judge Audrey Collins entered her order denying Petitioner's motion to set aside the protective order of November 6, 1984. On August 27, 1999, the Ninth Circuit Court of Appeals filed its memorandum opinion. On October 21, 1999, the Ninth Circuit Court of Appeals filed its order denying Petitioner's Petition for Rehearing and Rehearing in Banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rules of Civil Procedure 60(b)

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or

proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE AND OF THE FACTS

A. The Issuance of the Protective Order.

Plaintiff Air-Sea Forwarders, Inc. ("Air-Sea") was an international freight forwarder and customs house broker for Air Asia Co., Ltd. and its predecessors ("Air Asia") from 1947 until July 27, 1981. Until 1975, Air Asia was a CIA proprietary operating primarily out of Taiwan primarily as an "aircraft repair and maintenance facility" for Air America, "the CIA's secret Southeast Asian air force. . . . " In 1975 the CIA transferred formal ownership of Air Asia to E-Systems, Inc., a major defense contractor. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 179-180 (9th Cir. 1989).

On August 12, 1981, Air-Sea filed an action against Air Asia asserting that the termination was in violation of Air Asia's contract obligations. 880 F.2d 176, 180.

E-Systems responded to Air-Sea's pretrial discovery requests by moving for a protective order to restrict Air-Sea's access to confidential business information. In an *in camera, ex parte* hearing, the United States too sought a protective order (CR 757, Exh. A, p. 127).

The District Court signed the protective order which is the subject of this motion on November 6, 1984. The order "directed that no discovery be had and no evidence adduced at trial" as to contacts with foreign governments and information pertaining to "whether a confidential relationship existed between the United States" and E-Systems (the quotes are from a Government pleading: CR 757, Exh. A, p. 128).

Further, the order imposed severe restrictions on Air-Sea's access to the order itself. Erwin Rautenberg, plaintiff Air-Sea's president, and his counsel, Matthew S. Steinberg, were denied copies of the order and were only allowed to "examine" it for very brief periods at the office of the United States Attorney, under the scrutiny of government officials who forbade them to take notes or otherwise record their impressions of it. In addition, the court ordered Rautenberg and his attorney not to disclose to others the existence of the order or any of its terms, or even the fact that the government was actively involved in the case (CR 757, Exh. A, p. 128).

On November 7, 1984, the day after the District Judge signed the order, Rautenberg was peremptorily summoned to his attorneys' offices. There he was introduced to Lee Strickland of the CIA and Barbara Ward of the United States Department of Justice, who told him that they were going to serve him with an Order issued the

previous day, November 6, 1984, by District Court. He had no previous notice of the Order. The government agents directed Rautenberg to read the order and sign it, threatening him with prosecution and arrest when he at first refused. The government agents then told him that if he did not sign they would order my lawsuit dismissed, and that he would be arrested and "prosecuted." (ER 757, Declaration of Erwin Rautenberg, pp. 1-3).

Having been subjected to the intimidation of the agents, whom he understood to be armed, and having been told that he could not leave the room without signing the order, Rautenberg finally gave in to the persuasion of his attorneys, Mickey Kanter and John Emerson, and signed the Order. As a result of the coercion to which he was subjected, he suffered a severe attack of tinnitus (ringing in the ears) for the first time in his life. He has suffered from this disorder and associated vertigo ever since, and remains under doctor's care for these painful conditions (ER 757, Declaration of Erwin Rautenberg, pp. 3- 4).

The court amended the order on November 21, 1985. Air-Sea attempted unsuccessfully to have the order vacated on March 18, 1986 (CR 757, Exh. A, p. 36).

At the conclusion of the trial, the jury awarded Air-Sea $216,151.50 in compensatory damages for breach of contract, and $6,000,000 in punitive damages for the bad faith denial of the existence of the contract, as well as all attorneys' fees. The District Court then granted Air Asia's motion for judgment notwithstanding the verdict as to the bad faith claim, and a new trial as to the breach of contract claim. 880 F.2d 176, 181. On appeal, the Ninth

Circuit reversed the judgment j.n.o.v., and affirmed the alternative grant of a new trial as to all issues. 880 F.2d 176, 181-90.

In the course of its opinion, the Ninth Circuit noted that "the district court was in communication with government lawyers concerning the role of classified information," and that "the district court entered a supplemental protective order regulating the admission of certain classified evidence. . . . " 880 F.2d at 192.

B. Plaintiff's First Challenge of the Order in the Ninth Circuit.

In preparation for the new trial on remand, Air-Sea again moved to vacate the order, and the District Court again denied the motion on November 6, 1989 (CR 757, Exh. A, p. 36).

After unsuccessful efforts to negotiate mutually acceptable modifications of the order, Appellants filed their emergency petition for mandamus asking the Ninth Circuit to vacate the order on April 6, 1990 (CR 757, Exh. A, p. 37).

On June 11, 1990, the Ninth Circuit issued an order granting the writ petition unless the government filed a certification in support of its state secrets claim with the District Court, in which case the District Court was to rule on the claim (CR 757, Exh. A, p. 37).

On June 29, 1990, the government submitted the declaration of a federal government agency head asserting the state secret privilege (CR 757, Exh. A, p. 37).

On August 21, 1990, the District Court issued its order upholding the government's claim of the state secrets privilege. On October 11, 1990, Appellants filed their Supplemental Petition for Writ of Mandamus, again asking the Ninth Circuit to vacate, or at least to modify, the protective order. On February 13, 1991, the Ninth Circuit denied the petition. The court then granted Appellants' motion for reconsideration, but again denied the petition on April 1, 1991, and Moving Parties' Petition for Rehearing on April 29, 1991 (CR 757, Exh. A, p. 37).

C. The Action of the Supreme Court.

Thereafter, Plaintiff petitioned the Supreme Court for certiorari (ER 500, Exh. 4, p. 86). The certiorari petition sought relief from those aspects of the order which limit Plaintiff's access to its text and prohibit any party from publicly disclosing its terms, or the government's participation in obtaining it (ER 500, Exh. 4, pp. 98-99).

The Petition pointed out that "the intervention of the government and the existence of the protective order were disclosed in the published opinion of the Ninth Circuit Court of Appeals in this case" (ER 500, Exh. 4, p. 110), and went on to argue that the government could not lawfully assert the state secrets privilege as to those facts because they had become a matter of public record (ER 500, Exh. 4, p. 110).

Plaintiff moved to file the Petition under seal, in conformity with the practice that had been followed with previous pleadings relating to the protective order (CR 500, Exh. 2).

> In its response to the motion (CR 500, Exh. 3), the government conceded that "[b]ecause the government's interest in the litigation . . . is a matter of public record, reference to that interest in the certiorari petition may not be barred by the district court's protective order." Exh. 3, p. 74.

The government stated that it would therefore not oppose the public filing of a redacted version of the petition disclosing the United States' involvement in the case and much of the content of protective order itself (CR 500, Exh. 3, pp. 75-76).[1]

Plaintiff then moved to file the petition publicly in the redacted form suggested by the government, and the motion was granted (CR 500, Exhs. 4 and 5). The publicly-filed redacted petition (ER 500, Exh. 4, pp. 95-96) disclosed that the order "directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments" or as to "whether a confidential relationship existed between the United States and certain specified parties." It also described the provisions of the order which limit access to it and disclosure of it.

---

[1] In the Response, the government itself described the terms of the protective order as directing that "no discovery be had and that no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a confidential relationship existed between the United States and specified private entity." The government also disclosed the provisions in the order restricting access to and disclosure of it (CR 500, Exh. 3, pp. 68-69).

The government filed opposition to the Petition (ER 500, Exh. 6), insisting that there continued to be a "compelling interest" in maintaining the confidentiality of the aspect of the order not revealed in the public filing of the redacted petition: the identity of the "specified private entity" with which the United States has a "classified" relationship (ER 500, Exh. 6, pp. 154-56).

Plaintiff filed a reply in two forms. One version, filed publicly (CR 500, Exh. 7) did not disclose the identity of the "specified private entity". The other version, lodged under seal (ER 500, Exh. 8), did identify the "specified private entity" named in the Order (ER 500, Exh. 8, pp. 192-94).

On April 20, 1992, the Supreme Court denied the petition, but made additional orders which, in sum, lifted the seal from *all* of the pleadings before it with the exception of the original unredacted petition, and thereby placed the entire substance of the order, including the fact that it was aimed at protecting *E-Systems'* confidential relationships with the government, on the public record (ER 757, Exh. A, pp. 83-84).

D. The July 23, 1992 Amendment of the Order.

(Note: all pleadings, orders and transcripts filed in the following proceedings were filed publicly, not under seal).

On May 20, 1992, plaintiff filed its Motion to Modify the Protective Order in the District Court, asking that the Court (1) remove all restrictions on access to and disclosure of the order itself, (2) remove all restrictions on

disclosure of the interest of the United States government in obtaining it, (3) lift the seal from the order, and (4) order the government to provide plaintiff with certified copies of the original protective order and the November 21, 1985 amendment to it (CR 757, Exh. A, p. 39). At the hearing conducted in this matter on June 29, 1992, the District Court granted plaintiff's motion to amend the Protective Order in part, and denied it in part. The resulting order of July 23, 1992, amended the order to provide that its "disclosure restrictions" would not preclude restatement of anything contained in publicly-filed pleadings or "any other public record" (CR 757, Exh. A, p. 86).

E. Further Efforts to Modify the Order.

On April 14, 1994, Appellants filed a new motion to modify the protective order (CR 757, Exh. A, p. 29), arguing that recently received Defense Department confirmation of its confidential relationship with E-Systems had removed the last vestiges of justification from the provisions requiring that the order be kept under seal and that Rautenberg be denied possession of it. The motion was denied on May 23, 1994 (CR 757, Exh. A, p. 157).

On June 6, 1995, the District Court denied Appellant Air Sea Forwarders, Inc. to lift the seal from the protective order and held that it "remains the law of the case (ER 757, Exh. B)."

F. The Dismissal of the Action.

On August 1, 1996, this case having been settled, the District Court dismissed it with prejudice, but retained jurisdiction to enforce the settlement (ER 757, Exh. C).

G. The Motion to Set Aside the Protective Order.

On February 21, 1997, Robert S. Gerstein wrote on behalf of Appellants to Marcia K. Sowles, trial attorney in the Justice Department, asking her to confirm on behalf of the government that as a result of the dismissal the protective order had ceased to have any force or effect, and further asking the Government to join with the Air-Sea Forwarders in asking the District Court to lift the seal from the order, to allow Appellants to obtain a copy of it. Ms. Sowles responded on April 8, 1997, stating that the "disclosure restrictions of the protective order remain in effect . . . (CR 757, Exh. C to Declaration of Robert S. Gerstein)."

On July 21, 1997, Appellants filed a motion to set aside the protective order (CR 757). On September 22, 1997, District Judge Audrey Collins denied the motion, holding that she was without jurisdiction over the action because it had been settled and dismissed, and commenting that she would deny the motion if she had jurisdiction (ER 765).

On September 30, 1997, Appellants filed timely notice of appeal (ER 766).

On August 27, 1999, the Ninth Circuit Court of Appeals filed its memorandum opinion holding that the

District Court erred in finding that it had lost jurisdiction to vacate the protective order because the action had been dismissed, but finding nevertheless that the District Court was without jurisdiction to rule on the motion because the motion was not made under Rule of Civil Procedure 60(b). On October 21, 1999, the Ninth Circuit Court of Appeals issued its order denying Petitioner's petition for rehearing and rehearing in banc.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT IS WITHOUT JURISDICTION TO CONSIDER A MOTION JUST BECAUSE IT SHOULD HAVE BEEN, BUT WAS NOT, MADE UNDER RULE 60(B), IS CONTRARY TO THE UNIFORM JUDGMENT OF ALL OTHER COURTS WHICH HAVE RULED ON THE ISSUE.

The Ninth Circuit panel was satisfied that the District Judge erred in finding that it had no jurisdiction to set aside its own protective order after the case was concluded. Nevertheless, the panel went on to find that the District Court had no jurisdiction to act on Petitioner's motion, because it was not presented in the form required by Rule 60(b).

The panel reasoned that a 60(b) motion is required because the parties had settled the underlying litigation "without preserving any right to challenge the protective order at issue" (Appendix B, p. 2).

The problem with that analysis is that the settlement agreement was only between the private parties to the

lawsuit, and that the settlement explicitly states that it was made without prejudice to any further relief Appellants might seek as to the United States Government, in whose purported interest the protective order remains in force (ARB 14). The fact that only the United States Government, which was not a party to the underlying action and settlement, has seen fit to participate in this appeal, while the successor to E-Systems, which was a party to the underlying action and settlement, has shown no interest in doing so, is further evidence that the protective order has nothing whatever to do with the judgment entered on the basis of the settlement, except that the settlement and judgment rendered the protective *moot.* Thus, there was no need to invoke Rule 60(b) in seeking to have the order set aside.

Assuming the motion should properly have been made under Rule 60(b), however, the Ninth Circuit's holding that the failure to put the motion in Rule 60(b) form is contrary to every published opinion on the issue and the two major treatises on federal procedure.

In *Paddington Partners v. Bouchard,* 34 F.3d 1132 (2d Cir. 1994), the Second Circuit faced the question of whether relief could be given under Rule 60(b) where the issue was raised in an *opposition* to a summary judgment motion. The Second Circuit held that District Courts could do so, quoting Wright, Miller & Kane, 11 *Federal Procedure and Practice,* section 2865, p. 380 (1995) to the effect that District Courts have jurisdiction to grant relief under Rule 60(b) even where their attention has been "directed to the necessity for relief by means other than" a motion under section 60(b). 34 F.3d 1147, *supra.* The *Paddington* court also found support for its reasoning in

Moore & Lucas, *Moore's Federal Practice*, section 60.18[8], at 60-138-39 (1993), which it quoted to the effect that

> since nomenclature is unimportant, moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule.

A District Court in the Second Circuit had already taken the same approach, holding that a motion to amend a complaint could also be treated as a motion under Rule 60(b), because

> [d]ismissing the present motion on a procedural technicality would be wasteful since Plaintiff probably would refile its motion under the appropriate Rule.
>
> *Browning Avenue Realty Corp. v. Rosenshein*, 142 F.R.D. 85, 87 (S.D.N.Y.1992).

The Fifth Circuit has taken the same approach, holding in *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990), that a *motion for reconsideration* of a summary judgment can also be treated as a motion under Rule 60(b).

Indeed, even a District Court in the Ninth Circuit has held that an "Amended Notice of Dismissal," though unaccompanied by any supporting memoranda or affidavits, could be the basis for relief under Rule 60(b). *Noland v. Flohr Metal Fabricators, Inc.*, 104 F.R.D. 83 (D. Alaska 1984).

This Court should grant review here in order make it clear to the Ninth Circuit what other courts have already learned: that substantive rights should not depend on mere "nomenclature." By its decision in this case, the

Ninth Circuit, which has denied Petitioner *any* consideration of the merits of his claim to be freed of the noxious secret protective order, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." This Court should exercise that power by remanding this case to the Ninth Circuit and directing it to give Petitioner the decision on the merits of his claim, for which he has already had to wait far too long.

II. PETITIONER'S NEED FOR RELIEF FROM THE SECRET PROTECTIVE ORDER IS PRESSING.

Appellant Erwin Rautenberg is now 79 years old, and he has been a prisoner of the fear engendered by the secret protective order for the past 15 years. It is shameful to deny him relief from that order now on the basis of doubts about the form of the motion by which relief was requested.

As pointed out in the Opening Brief on appeal, the protective order came into existence to control discovery in the underlying case, and it has no further reason for existence now that the underlying case has been settled and dismissed.

Still, the Government argued that the protective order should be continued in force

> to bar Rautenberg and his counsel from disclosing provision within *the order itself* that identify the parties to a specific confidential relationship

> between the United States and a private contractor.
>
> GB 23 (emphasis added).

In taking that position the Government contradicts the facts as they appear on the record. The facts are these:

1. The Government stated in its opposition to Petitioner's petition for certiorari in March, 1992 that

> the protective order's nondisclosure provisions apply only to the classified relationship that is the subject of the government's state secret privilege. . . .
>
> ER 500/2, p. 18.

The Government made it clear by that language that only one secret remained in the protective order: the fact that E-Systems was the "specified private entity" whose confidential relationship with the Federal government was not to be disclosed.

2. In his sealed reply to the Government's opposition in April, 1992, Petitioner made the argument that the purported state secret contained in the protective order – that E-Systems did have classified contracts with the United States government – was a matter of public record which could be learned from published judicial opinions, unsealed court proceedings, and E-Systems annual reports (ER 500/3, pp. 11-15).

3. This Court then ordered the Petitioners' reply brief unsealed (ER 757/1). By that act, the Supreme Court placed on the public record Petitioner's avowal of his knowledge that E-Systems was the "specified private entity" named in the order.

4. Then, on July 23, 1992, the District Court made an order stating that "the disclosure restrictions of the Protective Order do not preclude restatement or other publication of statements of materials (i) in briefs which have been filed before this Court and appellate courts in this case and which are not under seal . . . (Supplementary ER, p. 13)."

The Government has asserted in this appeal that Petitioner's Supreme Court reply brief did not "reveal" that E-Systems was the "identified private entity" in the order, and that the passage referring to E-Systems did no more than "rehash public information about one of the defendants in the civil action and imply that the defendant and the party to the confidential relationship addressed by the protective order are one and the same (GB 23)."

The argument is disingenuous. In context, Petitioner had only one reason for "rehashing" public information about "one of the defendants": the defendant *was* E-Systems, and E-Systems *was* the entity named in the order. No one reading the reply would conclude otherwise (ER 500/3, pp. 11-13).

In any case, Petitioner removed any doubt on the issue when he filed his reply to the Government's opposition to their motion to modify the protective order in the District Court on July 19, 1992. There, in response to a similar argument from the Government, Petitioner stated explicitly that:

> . . . E-Systems *was* the "specified private entity" named in the Protective Order.
>
> CR 508, p. 5.

That reply brief, filed in the District Court, unmistakably falls within the District Court's order of July 23, 1992, which provides that "the disclosure restrictions of the Protective Order do not preclude restatement or other publication of statements of materials . . . in briefs which have been filed before this Court . . . and which are not under seal." (Supplementary ER, p. 13).

These facts establish beyond question that the protective order does *not* now "bar Rautenberg and his counsel from disclosing provision within the order itself that identify the parties to a specific confidential relationship between the United States and a private contractor, or "bar Mr. Rautenberg from revealing the contents of the order," as the Government asserts (GB 23, 24). As the District Judge said in the hearing preceding his issuance of that order, "you can put it on the front page of the L.A. Times if it actually is on the public record. (CR 514, p. 10)." The filing of the reply brief in the District Court without a seal (*and* without objection from the Government) placed the fact that E-Systems is the "specified private entity" named in the protective order "on the public record," and Petitioner can therefore repeat it "on the front page of the L.A. Times" if he pleases.

The Government goes on to argue that Petitioner's statements could not in any case "vitiate the confidentiality of state secrets where the government has not confirmed or denied the information in question (GB 23)."

Petitioner conceded that point in the Opening Brief, but pointed out that it is irrelevant to the question at hand. Petitioner does not seek to compel the Government to confirm that E-Systems is the "specified private entity" in the order, but only finally to free *Petitioner* from the constraints and fears which the protective order has so long imposed upon him (AOB 20-22).

Setting aside the order would *not* disturb the current "state secret" status of E-Systems' relationship with the Government. The decision to keep the relationship between E-Systems and the Government a state secret remains completely within the Government's control. It will continue to be a "state secret," whether the protective order continues to exist or not, so long as the Government continues its refusal to confirm it.

Thus, there is no reason to allow the order to stand.

But so long as the order does stand, Petitioner will continue to live with the pervasive fear and degradation it imposes upon him. Petitioner's health has been impaired since the brutal imposition of the order, which resulted in the tinnitus and associated vertigo from which he continues to suffer. During the nearly fifteen years since that time, Petitioner's health has continued to deteriorate under the stress created by the order, and he requires constant medical care.

This Court should exercise its supervisory power at least to direct the Ninth Circuit to consider *on the merits* Petitioner's showing that the protective order is both

useless and – from Petitioner's perspective – harsh and pernicious.

CONCLUSION

This Court gave Petitioner the only measure of relief he has received in the past 15 years when, in 1985, it entered its unsealing order, greatly expanding the range of information about the order which was on the public record. Now, this Court can give Petitioner the opportunity to bring his ordeal to a conclusion by directing the Ninth Circuit to do what all of the other courts which have considered the issue have done: consider Petitioner's motion on the merits despite its purported nonconformity with Rule 60 (b).

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AIR-SEA FORWARDERS, INC.; ERWIN RAUTENBERG, Plaintiffs-Appellants, v. AIR ASIA COMPANY; E-SYSTEMS, INC., Defendants-Appellees.	No. 97-56526 D.C. No. CV-81-04103-ABC MEMORANDUM[1] (Filed Aug. 27, 1999)

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted[2] July 16, 1999
Pasadena, California

Before: BRUNETTI, RYMER, and SILVERMAN, Circuit Judges.

Air-Sea Forwarders, Inc. and its president, Erwin Rautenberg, appeal the district court's denial of their motion to strike a protective order. The district court

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

determined that it lacked jurisdiction to consider the matter and further stated that it would deny the motion on the merits if it retained jurisdiction. We review the district court's conclusion that it lacks subject matter jurisdiction de novo and its underlying factual findings for clear error. *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). Although we conclude that the district court erred in finding that it lacked jurisdiction, we affirm as we agree that appellants have failed to demonstrate any reason justifying the lifting of the protective order.

A district court retains the power to modify or lift protective orders that it has entered. *See Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) (noting that, correlative to the inherent power to enforce a protective order, a district court necessarily retains the power to modify such orders in light of changed circumstances); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932). The appellants voluntarily agreed to dismiss this litigation with prejudice, without preserving any right to challenge the protective order at issue. Therefore, appellants are only entitled to have the order modified or lifted by filing a 60(b) motion and demonstrating that changed factual or legal circumstances have rendered the order inequitable. *See id.* at 119. Because appellants did not make their motion pursuant to Rule 60(b), the district court did not have jurisdiction and correctly denied the motion.

AFFIRMED.

APPENDIX 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV 81-4103 ABC Date: September 22, 1997

Title: *Air-Sea Forwarders, Inc., et al. v. Air Asia Company Limited, et al.*

DOCKET ENTRY

PRESENT: Hon. Audrey B. Collins, United States District Judge

Daphne Alex Deputy Clerk	*Not Present* Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: Order Re: Plaintiffs' Motion to Set Aside Protective Order (In Chambers)

Plaintiffs' Motion to Set Aside Protective Order was taken under submission on August 18, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Plaintiffs' Motion is DENIED.

The Court is without jurisdiction over this action, which was dismissed with prejudice on July 30, 1996. The

Court retained jurisdiction after dismissal only for the limited purpose of entering settlement. It is undisputed that this motion is totally unrelated to the settlement of this matter.

The Court is not in the habit of giving advisory opinions. However, in the hope of ensuring that this case, which was litigated for 15 years, can at last be put to rest, the Court advises the parties that if the Court had retained jurisdiction, it would still deny Plaintiffs' Motion to Set Aside Protective Order.

Copies to:

Judge Collins
Counsel of Record

Deputy Clerk D.A.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIR-SEA FORWARDERS, INC.; ERWIN RAUTENBERG, Plaintiffs-Appellants, v. AIR ASIA COMPANY; E-SYSTEMS, INC., Defendants-Appellees.	No. 97-56526 D.C. No. CV-81-04103-ABC ORDER (Filed Oct. 21, 1999)

Before: BRUNETTI, RYMER, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.